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No. 234

In the Supreme Court of the United States

OCTOBER TERM, 1932

THE UNITED STATES OF AMERICA, PETITIONER

v.

HENRY PRENTISS & COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court (R. 25–27) is reported in 46 F. (2d) 159. The opinion of the Circuit Court of Appeals (R. 76–79) is reported in 57 F. (2d) 676.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 18, 1932. (R. 80.) Petition for a writ of certiorari was filed July 18, 1932, and granted October 10, 1932 (R. 80). Jurisdiction is conferred upon this Court by Section 240 (a) of

the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondent filed a claim for refund of its 1918 taxes, stating specific grounds for refund. The respondent was notified that the claim would be rejected. After the expiration of the statutory period for filing claims for refund and while the Commissioner of Internal Revenue was reconsidering the first claim, respondent filed an additional brief or "application for refund" setting forth the grounds upon which the present suit was brought. The question is whether respondent has complied with the statutes requiring claims for refund to be filed within a specified period and providing that no suit may be maintained for the recovery of a tax unless a claim for refund has been filed.

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the statutes and regulations involved are set forth in the Appendix (pp. 14–22, *infra*).

STATEMENT

This was an action at law in the District Court for the Southern District of New York to recover alleged overpayments of income and excess-profits taxes for the years 1918 and 1920. Only the year 1918 is involved here. The District Court made findings of fact. (R. 33–41.) From these, the tes-

timony and the exhibits, the following material facts appear:

Respondent filed its income and excess-profits tax return for the year 1918 on June 16, 1919, and paid the tax shown to be due. An additional assessment was paid December 28, 1920. On March 25, 1924, it filed a claim for refund, stating as grounds for refund that it had failed to accrue any New York State tax and that because of abnormal conditions affecting income and invested capital it was entitled to special assessment. (R. 38, 43.) These are not the grounds urged in the present suit. (R. 40–41.) By letter dated July 16, 1925, the Commissioner of Internal Revenue informed the respondent that "your claim will be rejected" and that the Collector would be notified officially. The rejection schedule containing the rejection of the claim was not signed by the Commissioner until September 3, 1926. (R. 39, 45–46.)

After the letter of July 16, 1925, informing respondent that its claim was to be rejected, but before the rejection schedule was signed by the Commissioner, the Commissioner reconsidered respondent's claim for special assessment, and oral hearings were held on March 15 and April 12, 1926. (R. 18, 46–47.) On April 12, 1926, an additional brief or "application for refund" was filed (R. 16–18), which raised the issue relating to an adjustment of invested capital on account of an under-

statement of real-estate values. By stipulation, the brief which is respondent's Exhibit 12 (R. 16) was omitted from the Record (R. 58).

The sole ground upon which the present suit is based is that the Commissioner failed to include in the respondent's invested capital a part of the value of its real estate. The actual value of the real estate in 1916 was $81,000. The Commissioner allowed only $34,628.92. The District Court held that the claim for refund was insufficient in that it did not set forth "all facts" relied upon within the meaning of the statutes and regulations. (R. 26.) The Circuit Court of Appeals reversed this decision, holding that, while the original claim did not embrace the original grounds for recovery urged in this suit, the brief filed on April 12, 1926, was in effect an amended claim sufficient to advise the Commissioner, while the claim was under consideration, of the reasons relied on by respondent for its allowance, and that therefore there was a compliance with the statute. (R. 76–79.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that the amended claim for refund filed on April 12, 1926, after the expiration of the statutory period for filing claims for refund, was a sufficient compliance with the statute to permit maintenance of this suit.

2. In reversing the decision of the District Court.

SUMMARY OF ARGUMENT

No suit for the recovery of taxes may be maintained unless a timely claim for refund, setting forth the grounds on which the claim is based, is filed with the Commissioner of Internal Revenue. The original claim complied with the statute but did not set up the ground which was afterwards incorporated in another claim, not filed within the statutory period, upon which recovery is sought in the present suit. The timely claim was an application for special assessment; the untimely claim was a demand for an adjustment in invested capital based on an undervaluation of real estate. The two claims were not related in any respect. A timely claim is not susceptible of amendment after the period of limitations has expired so as to give the taxpayer the right to bring suit on another and different ground. Conditions attached to the right given to sue the Government must be strictly observed. The statute does not enlarge the period of limitations in cases where the Commissioner has not rejected a timely claim. The second claim was a new claim. It was not filed within the time prescribed by statute, and this requirement was not waived.

ARGUMENT

Respondent's petition filed in the District Court alleged, among other grounds not here material, that the Commissioner of Internal Revenue failed to include in invested capital a part of the value of

respondent's real estate. (R. 2–3.) It is submitted that no recovery should be had in this suit because no claim for refund presenting this ground was filed with the Commissioner within the period prescribed by statute for filing such claims.

A suit can not be maintained for taxes illegally collected unless a claim for them has been filed within the time prescribed by law. *Savings Institution* v. *Blair,* 116 U. S. 200.[1] In the instant case the period within which a claim for recovery of an overpayment of the 1918 taxes could be filed expired in 1924. The application for refund setting forth the ground urged in the present suit was filed on April 12, 1926. A suit to recover these taxes, based on this ground, is therefore barred.

The taxpayer contended, and the court below held, that the application for refund of April 12, 1926, was in effect an amendment of the claim filed in time on March 25, 1924. This original claim stated two grounds on which recovery was sought, namely, the failure to accrue any New York State taxes and an application for special assessment under Sections 327 and 328 of the Revenue Act of 1918. The first of these has no relation to the ground urged in the present suit. The second

[1] See also *Jonesboro Grocer Co.* v. *United States*, 66 C. Cls. 320, certiorari denied, 280 U. S. 562; *Feather River Lumber Co.* v. *United States*, 66 C. Cls. 54; *Grays Harbor Motorship Corp.* v. *United States*, 71 C. Cls. 167, 45 F. (2d) 259; *Snead* v. *Elmore*, 59 F. (2d) 312 (C. C. A. 5th); *Art Metal Const. Co.* v. *United States*, 47 F. (2d) 558 (C. C. A. 2d), certiorari denied, 283 U. S. 863.

ground relates to the so-called relief provisions of the Act which provide for a special method of assessment of excess-profits taxes in certain cases. In those cases the tax is computed without regard to the invested capital provisions of Sections 325 and 326 of the Revenue Act of 1918 and is determined by the ratio which the average tax of representative corporations engaged in a like or similar trade or business bears to their average net income. Accordingly, the second ground likewise has no relation to the ground urged in the present suit. The court below recognized that the relief granted by allowing a special assessment is not similar to that which is sought in this suit. In an analogous case, *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269, this Court said (p. 271) that an application for special assessment "has no relation to deductions from gross income on account of exhaustion or obsolescence of patents."[2] Similarly, the statute fails to disclose either expressly or by implication any relation between an application for special assessment and adjustments to statutory capital. Consequently, the claim filed April 12, 1926, must be regarded as an original claim and not as merely amendatory to the one which was filed in time.

[2] Other cases are *Jonesboro Grocer Co.* v. *United States*, *supra*; *Grays Harbor Motorship Corp.* v. *United States*, *supra*; *Feather River Lumber Co.* v. *United States*, *supra*.

The distinction between what may be amended and what may not is no doubt one of degree. *Solomon* v. *United States,* 57 F. (2d) 150 (C. C. A. 2d). The attempted amendment here so plainly departed from the original claim that it was clearly not within the class of permissible amendments.

Where a pleading is amended to allege a new cause of action the new cause is subject to a defense of the statute of limitations although the action was commenced before the statute ran. *Seaboard Air Line* v. *Renn,* 241 U. S. 290; *Union Pacific Railway* v. *Wyler,* 158 U. S. 285; *B. & O. S. W. R. Co.* v. *Carroll,* 280 U. S. 491. The situation here seems to be analogous. Recognition of a right to sue based upon an amended claim, filed after expiration of the statutory period, stating a new ground for refund, would involve a departure from the rule that where the United States consents to be sued a literal and meticulous compliance by the taxpayer with statutory requirements is imperative. See *United States* v. *Michel,* 282 U. S. 656; *Maas & Waldstein Co.* v. *United States,* 283 U. S. 583; *Rock Island, etc., R. R.* v. *United States,* 254 U. S. 141; *Maryland Casualty Co.* v. *United States,* 251 U. S. 342.

If notice on July 16, 1925, that the original claim would be rejected is equivalent to a rejection, recovery is barred for another reason. A claim for refund can not be amended after rejection but must be considered as a new claim. *Jonesboro Grocer*

Co. v. *United States, supra; Solomon* v. *United States, supra; Mutual Life Ins. Co.* v. *United States,* 72 C. Cls. 204, 49 F. (2d) 662, certiorari denied, 284 U. S. 628; *Wausau Sulphate Fibre Co.* v. *United States,* 72 C. Cls. 189, 49 F. (2d) 665. In the instant case the court below stated as its reason for not considering the second claim as a new claim the fact that it was filed prior to the final rejection of the first claim which was timely. But the statutory period within which claims may be filed is measured not by the period within which a claim timely filed is considered by the Commissioner but by the five-year period after the return was due or the four-year period after the tax was paid. The decision below would dispense with the statute in all such cases.

Some cases have held that if facts and reasons are stated in the claim the taxpayer need not mention a provision of law applicable to his claim, nor is he precluded from advancing in court a new reason or theory applicable to his claim, nor from amending a defective claim by submitting additional evidence to the Commissioner relating to the ground presented in the claim.[3] Those conditions

[3] See *Dreyfuss* v. *Lines*, 24 F. (2d) 29 (C. C. A. 5th); *McKesson & Robbins* v. *Edwards*, 57 F. (2d) 147 (C. C. A. 2d); *Swift & Co.* v. *United States*, 67 C. Cls. 322; *Paul Jones & Co.* v. *Lucas*, 33 F. (2d) 907 (W. D. Ky.); *Union & New Haven Trust Co.* v. *Eaton*, 20 F. (2d) 419 (Conn.); *Wunderle* v. *McCaughn*, 38 F. (2d) 258 (E. D. Pa.).

are not present here. No reference to the real estate item is found in the original claim.[4] The only claim upon which a timely suit could have been brought was the original claim, but, as the ground there stated is not the ground urged in the present suit, recovery is barred.[5] The facts disclose no waiver by the Commissioner which would bring the case within the rule of *Tucker* v. *Alexander*, 275 U. S. 228. By letter dated July 16, 1925, the Commissioner informed the respondent that "your claim will be rejected" and that the Collector would be notified officially. This referred to the claim for special assessment for that was the only claim before the Commissioner. Thereafter the Commissioner reconsidered respondent's claim and oral hearings were held on March 15 and April 12, 1926. On April 12, 1926, an additional brief or application for refund was filed. On September 3,

[4] The effect of a general reservation of rights and claim of illegality appearing in an application for refund is discussed in the Government's brief filed in the case of *United States* v. *Factors & Finance Co.*, No. 141, October Term, 1932.

[5] *United States* v. *Felt & Tarrant*, *supra*; *Bemis Bros. Bag Co.* v. *United States*, 60 F. (2d) 944 (C. C. A. 8th); *Red Wing Malting Co.* v. *Willcuts*, 15 F. (2d) 626 (C. C. A. 8th); *Snead* v. *Elmore*, *supra*; *J. P. Stevens Engraving Co.* v. *United States*, 53 F. (2d) 1 (C. C. A. 5th); *H. Lissner Co.* v. *United States*, 52 F. (2d) 1058 (Ct. Cls.); *Solomon* v. *United States*, *supra*; *J. H. Williams & Co.* v. *United States*, 46 F. (2d) 155 (E. D. N. Y.); *Taylor-Lockwood Co.* v. *United States*, 71 C. Cls. 360, 45 F. (2d) 284.

1926, the Commissioner signed the schedule containing the previously rejected claim.

The Commissioner's reconsideration of the claim for special assessment so as to afford the taxpayer an opportunity to present additional evidence in support of the claim may not be construed as allowing a new claim presenting a different ground for recovery to be filed after the statute had run. Such reconsideration merely indicated the Commissioner's willingness to postpone scheduling the rejection during the presentation and consideration of additional evidence on the grounds for refund set forth in the original claim. The respondent offered evidence to show that the new issue was discussed and considered in the conference. This offer of proof was rejected and an exception taken. (R. 17–18.) The court below took cognizance of the rejected testimony and held that this was sufficient upon which to base a claim under Section 326 of the Revenue Act of 1918 as to the allowance for real estate increases. This view overlooks the fact that the original claim was reconsidered solely to afford the taxpayer an opportunity to present additional evidence bearing upon the application for special assessment. A discussion or even an examination at that time into the merits of the barred claim did not in any manner affect the taxpayer's legal status. *Jonesboro Grocer Co.* v. *United States, supra; Lewis A. Crossett Co.* v. *United States,* 72 C. Cls. 292, 50 F. (2d) 292. Nor does the Commissioner's admission, in the answer to the taxpayer's petition,

that he refused to include in invested capital the real estate item, constitute a waiver of a compliance with the statute. In the absence of statutory authority the Commissioner cannot waive the period prescribed for suits against the Government. *Finn* v. *United States,* 123 U. S. 227; *Art Metal Const. Co.* v. *United States, supra,* certiorari denied, 283 U. S. 863; *Bemis Bros. Bag Co.* v. *United States,* 60 F. (2d) 944 (C. C. A. 8th). Since the new claim filed after the statute had run was not an amendment of the original claim, the Commissioner could not waive compliance with the statute. The waiver alleged dispenses not with formalities in compliance with the law but with the law itself. The Commissioner may not waive the conditions upon which the United States consented to be sued.

The facts here are not like those in *Tucker* v. *Alexander, supra.* There the claim set forth two grounds of illegality and when the action came on for trial the tax was contested upon a third. The Government's counsel at the trial stipulated that if the Commissioner's deduction of a return of capital was erroneous, the petitioner should have judgment. Thus all other questions, including the question of the sufficiency of the claim for refund to support suit on the new theory, were taken out of the case by stipulation. This took place before the time had expired for filing a claim for refund based on the third ground. This Court said (p. 232):

> Such waivers, if allowed, would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist—consequences which do not attach to the waiver here.

In the present case it does not appear that any conduct by the Commissioner misled the respondent into allowing the time for filing a proper claim to expire. When the amended claim was filed it was already too late. None of the considerations which suggest that a formal stipulation in the course of trial waiving compliance should be given full effect, have any application here. Throughout this litigation the Commissioner has consistently maintained that the respondent did not comply with the statutory requirements and that the suit must fail for that reason.

CONCLUSION

The decision of the court below is erroneous and should be reversed.

Respectfully submitted.

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APPENDIX

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1091, 1092, 1093:

SEC. 325. (a) That as used in this title—

The term "intangible property" means patents, copyrights, secret processes and formulae, good will, trade-marks, trade-brands, franchises, and other like property;

The term "tangible property" means stocks, bonds, notes, and other evidences of indebtedness, bills and accounts receivable, leaseholds, and other property other than intangible property;

The term "borrowed capital" means money or other property borrowed, whether represented by bonds, notes, open accounts, or otherwise;

The term "inadmissible assets" means stocks, bonds, and other obligations (other than obligations of the United States), the dividends or interest from which is not included in computing net income, but where the income derived from such assets consists in part of gain or profit derived from the sale or other disposition thereof, or where all or part of the interest derived from such assets is in effect included in the net income because of the limitation on the deduction of interest under paragraph (2) of subdivision (a) of section 234, a corresponding part of the capital invested in such assets shall not be deemed to be inadmissible assets;

The term "admissible assets" means all assets other than inadmissible assets, valued in accordance with the provisions of subdi-

vision (a) of section 326, section 330, and section 331.

(b) For the purposes of this title, the par value of stock or shares shall, in the case of stock or shares issued at a nominal value or having no par value, be deemed to be the fair market value as of the date or dates of issue of such stock or shares.

SEC. 326. (a) That as used in this title the term "invested capital" for any year means (except as provided in subdivisions (b) and (c) of this section):

(1) Actual cash bona fide paid in for stock or shares;

(2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus: *Provided,* That the Commissioner shall keep a record of all cases in which tangible property is included in invested capital at a value in excess of the stock or shares issued therefor, containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, the value of the tangible property at the time paid in, the par value of the stock or shares specifically issued therefor, and the amount included under this paragraph as paid-in surplus. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when

required by resolution of either House of Congress, without regard to the restrictions contained in section 257;

(3) Paid-in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year;

(4) Intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest;

(5) Intangible property bona fide paid in for stock or shares on or after March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year, whichever is lowest: *Provided,* That in no case shall the total amount included under paragraphs (4) and (5) exceed in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year; but

(b) As used in this title the term "invested capital" does not include borrowed capital.

(c) There shall be deducted from invested capital as above defined a percentage thereof equal to the percentage which the amount of inadmissible assets is of the amount of admissible and inadmissible assets held during the taxable year.

(d) The invested capital for any period shall be the average invested capital for such period, but in the case of a corporation making a return for a fractional part of a year, it shall (except for the purpose of paragraph (2) of subdivision (a) of section 311) be the same fractional part of such average invested capital.

The average invested capital for the prewar period shall be determined by dividing the number of years within that period during the whole of which the corporation was in existence into the sum of the average invested capital for such years.

SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the

representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

Revenue Act of 1921, c. 136, 42 Stat. 227, 268:

SEC. 252. That if, upon examination of any return of income made pursuant to * * * the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: * * *

Revenue Act of 1924, c. 234, 43 Stat. 253, 342:

SEC. 1012. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in section 281

of the Revenue Act of 1924, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

"(b) Except as provided in section 281 of the Revenue Act of 1924, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed." (U. S. C. Title 26, Sec. 157.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 66, 116:

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, * * * the Revenue Act of 1918 * * * or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively,

immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund. (U. S. C. App., Title 26, Sec. 1065.)

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enact-

ment of the Revenue Act of 1924. (U. S. C. App., Title 26, Sec. 156.)

Treasury Regulations 62:

ART. 1036. *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. * * *

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